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GUIDE TO TAKEOVERS IN MALAYSIA

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CHAPTER 1 KEY LAWS AND REGULATIONS

Take-overs, mergers and acquisitions in Malaysia ("**Code Takeovers**") are primarily governed by the Capital Markets and Services Act 2007, the new Malaysian Code on Take-Overs and Mergers 2016 and the Rules on Take-Overs, Mergers and Compulsory Acquisitions 2016.

(1) Capital Markets and Services Act 2007 ("CMSA")

The CMSA regulates and provides for matters relating to the activities of markets and intermediaries in the Malaysian capital markets. In terms of Code Takeovers, the CMSA empowers the Securities Commission Malaysia ("**SC**") to make recommendations to the Minister of Finance and to administer the Code according to the objectives under the CMSA. The CMSA also provides for compulsory acquisition by offerors in a takeover and rights of minority shareholders under such a scenario.

(2) Malaysian Code on Take-Overs and Mergers 2016 ("Code") Rules on Take-Overs, Mergers and Compulsory Acquisitions 2016 ("Code Rules")

The Code is issued and administered by the SC and is enacted pursuant to Section 217 of the CMSA. The Code had recently undergone a significant revamp and the Malaysian Code on Take-Overs and Mergers 2010 has been revoked by the new Code. All Code Takeovers that have commenced or been undertaken prior to the new Code shall be dealt with under the previous Code as if it has not been revoked.

In order to facilitate market activities in a fast changing environment whilst ensuring appropriate shareholder protection, the SC had on 15 August 2016 launched the Rules on Take-Overs, Mergers and Compulsory Acquisitions 2016. The Code Rules stipulates operational and conduct requirements for Code Takeovers and is issued as a guideline pursuant to Section 377 of the CMSA.

According to SC's press release on 15 August 2016, it revolves around the principle that all shareholders must be treated equally in any Code Takeovers and should not be disadvantaged by the treatment or conduct of any relevant party to a Code Takeover.

Among others, the Code, through the Code Rules, has extended the definition of "company" in the context of take-overs, mergers and compulsory acquisitions under the CMSA and specified the application of the new Code to only sizeable unlisted public companies, removing the limitation that Code Takeovers under scheme of arrangement can only be initiated by parties holding over 50% equity interest and providing clearer guidance under the Code Rules on required conduct during a Code Takeover.

Under the new Code, a target company being taken over ("**Target**"), now includes:

(a) a public company whether or not it is listed on any stock exchange and any other entity as may be prescribed in the Code;

(b) an unlisted Malaysian public company with more than 50 shareholders and net assets of RM15 million or more. If its net asset value does not reflect its current value, a revaluation should be conducted;

(c) a business trust listed on Bursa Malaysia Securities Berhad ("**Bursa**"); and

(d) a real estate investment trust listed on Bursa.

As such, a takeover offer in respect of any such Target must be in compliance with the provisions of the Code and any ruling made by the SC.

The new Code sets out the following 12 general principles that must be observed and complied with by all persons engaged in any Code Takeovers:

1. So far as practicable, all shareholders of an offeree of the same class shall be treated equally in relation to a Code Takeover and have equal opportunities to participate in benefits accruing from the Code Takeover (including in the premium payable for control);

2. The acquirer / offeror (as the case may be), and its board of directors ("**Board**") shall, act in good faith in observing these general principles and any guidelines / directions / practice notes / rulings issued by SC and all shareholders (particularly the minority shareholders) shall not be subject to oppression or disadvantages by treatment and conduct of the acquirer / offeror or its Board;

3. The acquirer / offeror shall ensure that he is able to implement the offer in full and its financial advisers must also be satisfied of such ability;

4. An offeree which receives an offer / is approached with a view to a Code Takeover being made shall, in the interests of its shareholders, appoint a competent independent adviser ("**IA**") to provide comments / opinion / information / recommendation on the Code Takeover;

5. Full and prompt disclosure of all relevant information by parties involved in the Code Takeover;

6. Shareholders and the Board of an offeree and the market for the shares that are subject to the Code Takeover shall be provided with relevant and sufficient information (including identity of the acquirer / offeror) to enable them to reach an informed decision and to have reasonable time to consider the Code Takeover;

7. Any document / advertisement addressed to the shareholders containing information on the Code Takeover shall be prepared with the same standard of care as if the document / advertisement was a prospectus within the meaning of the CMSA;

8. An offeror and its Board, the Board of an offeree and their respective advisers are prohibited from making selective disclosure to the shareholders in the course of a Code Takeover or when such transaction is in contemplation, except where such information is provided in confidence by the Board of the offeree to a bona fide offeror / potential offeror to the Board of the offeree;

9. While the Board of an offeror and the offeree and the respective advisers and associates have a primary duty to act in the best interest of their respective shareholders, any guidelines / rulings issued by the SC may restrict the Board and person involved in a Code Takeover from undertaking certain actions;

10. The Code Takeover shall be made to all shareholders within the same class in an offeree for all the voting shares / voting rights in the offeree and in the case of an approved partial offer, the offeror shall accept such voting shares / voting rights in the same proportion from each shareholder of an offeree in order to achieve the specified percentage of holding in the offeree;

11. The Board of an offeree shall act in the interests of the shareholders as a whole and shall not deny the shareholders the opportunity to decide on the Code Takeover; and

12. The period in which an offeree is subject to a Code Takeover shall not be longer than what is reasonable.

Other key laws and regulations that are relevant to Code Takeovers are set out below:

(3) Companies Act 1965 ("Companies Act")

While the CMSA and the Code mainly govern the processes and procedures of a Code Takeover offer, the Companies Act provides for *inter alia* the conduct and affairs of companies, director's duties and disclosure requirements on substantial shareholding in a company. However, the new Companies Act 2016 ("**New CA**") which received its royal assent on 31 August 2016 and gazetted on 15 September 2016, will replace the entire Companies Act and is expected to come into force in stages starting from 1 January 2017.

(4) Bursa Malaysia Securities Berhad Listing Requirements ("Listing Requirements")

Where a company is listed on Bursa (whether on the Main Market or the Ace Market), the company is required to comply with the Listing Requirements (with each of the Main Market and Ace Market having its own requirements) which contains rules that govern matters such as the conduct of a public listed company, the procedures in a Code Takeover, new issue of securities, continuing listing obligations including continuing disclosure requirements, and public spread requirements.

CHAPTER 2 KEY GOVERNMENT REGULATORS AND AGENCIES

There are a number of regulatory bodies that are tasked with overseeing Code Takeovers.

(1) Securities Commission Malaysia (“SC”)

The SC was established under the Securities Commission Malaysia Act 1993. Its functions include encouraging and promoting the development of the capital markets in Malaysia through the regulation of all matters relating to the securities industry. The SC has wide rule-making and enforcement powers which include regulating Code Takeovers and ensuring compliance with the provisions of securities laws, including the CMSA and the Code.

(2) Companies Commission of Malaysia (“CCM”)

The CCM is a statutory body formed under the Companies Commission of Malaysia Act 2001 which regulates companies and businesses. The CCM serves as an agency to incorporate and register businesses. The CCM ensures compliance with the Companies Act, which regulates all aspects of locally incorporated companies, including instances of sale, conveyance and transmission of its securities as well as substantial acquisitions or disposals of a company's business (assets and liabilities).

(3) Bursa Malaysia Berhad

Bursa Malaysia Berhad is an exchange holding company approved under Section 15 of the CMSA. Bursa operates a fully-integrated exchange, offering a comprehensive range of exchange-related facilities including listing, trading, clearing, settlement and depository services. Bursa Malaysia Securities Berhad or Bursa, a wholly owned subsidiary of Bursa Malaysia Berhad, is the main regulator with the primary responsibility to oversee compliance by listed companies with the Listing Requirements.

(4) Labuan International Financial Exchange ("LFX")

LFX is an international financial exchange based in Labuan and is wholly owned by Bursa Malaysia Berhad. LFX was established to complement the various business financial services available in Labuan. LFX is a one-stop financial exchange offering full services from the submission of application to approval, listing, trading and settlement of the instruments listed.

(5) Labuan Financial Services Authority (“LFSA”)

The LFSA was established under the Labuan Financial Services Authority Act 1996. LFSA is the statutory body responsible for the development and administration of the Labuan International Business and Financial Centre ("**Labuan IBFC**"). Labuan IBFC offers a wide range of business and investment structures facilitating cross-border transactions, business dealings and wealth management needs.

(6) Central Bank of Malaysia or Bank Negara Malaysia (“BNM”)

BNM was established in 1959 under the then Central Bank of Malaya Act 1958 (now known as the Central Bank of Malaysia Act 2009) to act as the financial adviser, banker and financial agent of the Malaysian government, as well as the authority responsible for regulating the banking and financial services industry and to ensure stability of the country's financial system. BNM is the key regulator for most if not all financial institutions in Malaysia and wields a wide range of powers in order to maintain the stability of the financial system. It reports to the Minister of Finance, Malaysia and keeps the Minister informed of matters pertaining to monetary and financial sector policies and issues. In the context of Code Takeovers, the approval of BNM is required in connection with the acquisition of interests of companies in the financial sectors. For instance, Code Takeovers involving companies in the insurance or banking sectors are subject to the Financial Services Act 2013 or the Islamic Financial Services Act 2013, which are under the purview of BNM. These statutes provide for specific approvals that affect the manner in which a Code Takeover may be carried out.

(7) Other regulatory authorities

In Malaysia, there are also a number of industry regulators responsible for issuing operating licences across different industry sectors. Depending on the industry in which the Target operates, such industry regulators may impose specific conditions or other requirements, or require the Target to obtain approval from such regulator in connection with a Code Takeover. For instance, manufacturing companies are required to obtain manufacturing licence pursuant to the Industrial Co-ordination Act 1975, and the acquisition of interests in manufacturing companies may require the approval of the Malaysian Industrial Development Authority and the Ministry of International Trade and Industry ("**MITI**"). In this regard, certain merger and acquisition transactions would be subject to conditions imposed under the licence, particularly conditions relating to shareholdings or local/ foreign equity restrictions.

CHAPTER 3 TYPES OF CODE TAKEOVERS

Pursuant to the Code and the Code Rules, different triggers result in different types of take-over offers. We outline below the types of offers under the Code Rules.

Also discussed is the concept of 'persons acting in concert' (“**PACs**”) with the acquirer under the Code Rules. An acquirer needs to be aware of the presumptions that may result in persons deemed acting in concert with the acquirer as actions of the PACs may be attributed to the acquirer as if they were acts of the acquirer. A PAC can also trigger a mandatory obligation under the Code Rules which may have to be undertaken by the PAC and the person with whom it is presumed to be acting in concert.

It should be noted that Rule 1.06 of the Code Rules provides for the Code and the Code Rules to also apply to any person who carries out a take-over offer, howsoever effected, including by way of a scheme of arrangement, compromise, amalgamation or selective capital reduction and repayment.

(1) Voluntary Offers

A voluntary offer is not one which the bidder is compelled to make by law, and is an offer made by a bidder who may or may not hold shares in a company, to purchase all or part of the shares from all current shareholders of a company. In the case of a voluntary offer, Rule 6.01(2) of the Code Rules provides that the acceptance of the offer shall be conditional upon the bidder having received acceptances which would result in the bidder holding in aggregate more than 50% of the voting shares or voting rights in the offeree. The SC may allow a voluntary offer to be conditional upon a higher level of acceptances (but not less than the statutory control) subject to the offeror having satisfied the SC that he is acting in good faith in imposing such high level of acceptance.

For a voluntary offer, an offeror may include any conditions except a defeating condition, where the fulfilment of which depends on:

(a) the subjective interpretation or judgement of the offeror; or

(b) whether or not a particular event happens, being an event that is within the control of the offeror.

(2) Partial Offers

A partial offer is a type of voluntary take-over offer whereby a bidder offers to acquire less than 100% of any class of the voting shares or voting rights of a company. A partial offer can only be made with the prior written consent of the SC. Consent will normally be granted where a partial offer would not result in the bidder and PACs holding more than 33% voting shares or voting rights of the Target.

(3) Mandatory Offers

As the name suggests, a mandatory offer is one which a bidder is compelled to make by law. A bidder triggers the obligation to extend a mandatory offer to acquire all the shares of the Target which he or persons acting in concert with him do not, already own if the bidder, together with persons acting in concert with him:

(a) acquires more than 33% of a company (i.e. obtains control);

(b) triggers the ‘creeping threshold’ (holds between 33% and 50% of the voting shares or voting rights, and acquires more than 2% of the voting shares or voting rights in any period of 6 months); or

(c) acquires between 20% and 33% of the target's voting shares and the SC exercises its discretion to trigger the mandatory general offer requirements.

(4) Compulsory Acquisitions

Under Section 218(3) of the CMSA, an acquirer who has obtained control shall not acquire any additional voting shares or voting rights in the offeree except in accordance with the provisions of the Code and any ruling made pursuant to the CMSA. For more information, please refer to Chapter 5.

(5) Persons Acting in Concert (“PACs”)

The Code Rules provides that a voluntary offer becomes a mandatory offer if the PACs with an offeror acquire voting shares or voting rights that may trigger an obligation on the part of the offeror and the PACs to make a mandatory offer.

According to the CMSA, “***persons acting in concert***” shall be construed as reference to persons who, pursuant to an agreement, arrangement or understanding, co-operate to:

(a) acquire jointly or severally voting shares of a company for the purpose of obtaining control of that company; or

(b) act jointly or severally for the purpose of exercising control over a company.

The arrangement or understanding can be formal or informal, whether written or oral, whether express or implied or whether or not having legal or equitable force. In relation to a take-over offer of an entity other than a corporation or a public company, SC may specify persons who may be presumed to be a PAC. It therefore appears that, to determine whether a person is presumed to be a PAC is very much a question of fact.

Without prejudice to the generality of the above description of a PAC, the CMSA sets out the following presumptions for a person to be deemed a PAC unless the contrary is established:

(a) a corporation and its related and associate corporations. Associated corporations are established when a corporation holds not less than 20% of the voting shares in the other corporation;

(b) a corporation and any of its directors, or the close relative (i.e. mother, father, child, brother, sister, an adopted child or a step child) of any of its directors, or the spouse of any such director or any such relative, or any related trusts;

(c) a corporation and any pension fund established by it;

(d) a person and any investment company, unit trust or other fund whose investments such person manages on a discretionary basis;

(e) a financial adviser and its client which is a corporation, where the financial adviser manages on a discretionary basis the corporation's funds and has 10% or more of the voting shares in that corporation;

(f) a person who owns or controls 20% or more of the voting shares of a corporation falling within paragraph (a) and any close relative of such person, or the spouse of such person or any such relative, or any related trusts together with one or more persons falling within paragraph (a);

(g) partners of a partnership;

(h) an individual and any person who is accustomed to act in accordance with the instructions of the individual, and the close relative of, companies controlled by, or related trusts of, the individual; and

(i) a person, other than a licensed bank or a prescribed institution, who, directly or indirectly, provides finance or financial assistance, in connection with an acquisition of voting shares or voting rights, with a person who receives such finance or financial assistance.

Notwithstanding so, if the acquirer intends to rebut the presumption of a particular person as his PAC, he may do so by applying to the SC for a rebuttal of the presumption and it is the prerogative of SC to issue rulings allowing or rejecting the rebuttal. The Code also introduces a set of criteria to rebut the presumptions of persons acting in concert. Persons who are not acting in concert can present evidence to rebut the legal presumptions.

CHAPTER 4 HOSTILE BIDS UNDER THE CODE

A hostile bid is a takeover bid that is not favoured by the management or the board of directors of the Target. Notwithstanding that a hostile bid is presented directly to the shareholders of the Target thus, bypassing the board, the Target's board of directors must provide a firm recommendation on whether the hostile bid should be accepted or rejected having considered the evaluations and recommendations by the independent adviser on the "fairness and reasonableness" of the offer.

A recent example of a hostile bid is the take-over offer by Tenaga Nasional Berhad ("**TNB**") of Integrax Berhad ("**Integrax**"). In 2015, TNB made an offer to acquire all the remaining shares not already held by TNB in Integrax at an initial offer price of RM2.75 per share. Notwithstanding that the offer was "not fair but reasonable", the board recommended that the shareholders reject the offer on the basis that the offer was "not fair" and this outweighed its "reasonableness". The offer price was subsequently revised to RM3.25 per share and ultimately accepted by the shareholders notwithstanding the board recommending that the shareholders reject the revised offer on the basis that underlying value of the shares was at a material premium to the revised offer price.

The Code and Code Rules do not contain any prohibition on hostile bids. Notwithstanding this, hostile bids are not a common practice in Malaysia as the hostile bidder is deprived of an opportunity to conduct due diligence on the Target and hence, is only able to rely on publicly available information such as the constitutional and corporate documents lodged with the CCM, or financial statements lodged pursuant to listing rules and regulations.

CHAPTER 5 SQUEEZE OUT OF MINORITY SHAREHOLDERS

Under Section 222 of the CMSA, where a Code Takeover has been made and that offer has been accepted by holders of not less than 90% in the nominal value of those shares of that class (excluding shares already held at the date of the takeover offer by the offeror and persons acting in concert), the offeror can, within 4 months of making that offer, compulsorily acquire shares from the remaining minority shareholders.

The successful offeror is required to give notice to the remaining minority shareholders in the forms stipulated in Schedule 5 of the Code Rules (depending on whether it is addressed to a dissenting shareholder or a shareholder who has not accepted to the offer) within 2 months from the date the 90% acceptance condition has been achieved. This notice is to indicate its desire to acquire their shares and should include a copy of a statutory declaration by the offeror that the conditions for the giving of the notice are satisfied.

Upon receipt of such notice, the remaining minority shareholders have the option under Section 222(2) of the CMSA to serve a written demand requesting for a written statement of the names and addresses of all other remaining minority shareholders as shown in the register of members. The offeror is not entitled to acquire the shares of the remaining minority shareholders until 14 days after the posting of the written statement.

After the expiration of 1 month from the notice, the offeror is required to send a copy of the said notice and an instrument of transfer executed on behalf of all such minority shareholders by the offeror and pay, allot or transfer to such minority shareholders the amount or consideration for the shares to which the notice relates.

Similarly, under Section 223 of the CMSA, where a takeover offer has been accepted by holders of not less than 90% in the nominal value of those shares of that class (excluding shares already held at the date of the takeover offer by the offeror and persons acting in concert), the remaining minority shareholders may within the offer period require the offeror to acquire its shares on terms of the takeover offer or such other terms as may be agreed.

CHAPTER 6 RESTRICTIONS OR OTHER LAWS ON CODE TAKEOVERS

Code Takeovers may be subject to other legislation or requirements by various regulatory authorities depending on the type of transaction being undertaken. Certain licensing authorities are responsible for issuing operating licences in sectors such as banking, service and manufacturing industries. Approval from the relevant regulators may be required when the Code Takeover will result in a change of the company's status or if required under the relevant regulations/guidelines and/or conditions of the operating licences.

For instance, in relation to the banking sector, under the Financial Services Act 2013, the acquisition and disposal of 5% or more of the issued share capital of a licensed financial institution will need to be approved by BNM. Additionally, the approval of the Minister of Finance will be required if the proposed Code Takeover will result in the acquirer obtaining control or holding more than 50% of the equity interest in the licensed financial institution.

Another sectoral regulator is the Ministry of Domestic Trade Co-operatives and Consumerism ("**MDTCC**"). MDTCC's Guidelines on Foreign Participation in the Distributive Trade Services in Malaysia subjects all proposals for foreign involvement in distributive trade, e.g. hypermarkets and department stores, to the approval of the MDTCC. These would include acquisition of interest in, and mergers and/or takeover of distributive trade businesses by foreign entities.

The Malaysian government has in recent years, undertaken liberalisation measures and now allows up to 100% foreign equity participation in a number of service sub-sectors, with no equity conditions imposed. These sub-sectors include health and social services, transport services, business services and computer and related services. The Malaysian government is also opening up several service sectors such as telecommunications, healthcare, certain professional and environmental services, to allow up to 100% foreign equity participation in phases.

Malaysia's anti-competitive legislation is set out in the Competition Act 2010 ("**Competition Act**"). The Competition Act regulates anti-competitive practices and prohibits abuse of a company's dominant market position and is enforced by the Malaysian Competition Commission ("**MyCC**"). However, there is no requirement for any Code Takeover to be approved by the MyCC.

CHAPTER 7 DOCUMENTATION FOR CODE TAKEOVERS

Depending on the nature of the Code Takeover, various types of documents will be involved over the duration of the Code Takeover.

(1) Offer Letter / Offer Notice

Code Takeovers may commence with an offer letter or letter of intent issued by the interested acquirer to the owner of the business or company to be acquired in order to engage in discussions. This document usually does not bind the parties to commit to the transaction until the execution of a definitive agreement but may contain provisions subjecting the parties to confidentiality and exclusivity obligations. Advisers to the transaction have the obligation to warn their clients of the importance of secrecy and security under the Code Rules.

(2) Non-Disclosure Agreement / Confidentiality Agreement

Alternatively, parties may opt to enter into a confidentiality agreement or a non-disclosure agreement to set out detailed obligations regarding confidentiality and exclusivity. Such agreements will be binding on the parties for an agreed period and usually contains provisions for the acquiree to seek recourse for any leakage of information by the acquirer in the event the transaction falls through.

(3) Due Diligence Enquiry

Due diligence enquiry is a crucial stage for any Code Takeover. It provides an avenue for the acquirer to understand the Target and its business in a thorough manner and usually, with the help of professionals such as financial advisers (e.g. accountants and auditors), legal advisers, tax advisers and any other professionals (e.g. surveyors) and where necessary, business advisers to advise on issues relevant to the nature of the business to be acquired. Generally, the due diligence process would include documents such as the due diligence enquiry list, due diligence report, and due diligence questionnaires.

In friendly Code Takeovers, a potential acquirer is usually allowed to conduct its due diligence on the Target. It is however different if it is a hostile Code Takeover. The Target may feel strongly against the potential acquirer conducting due diligence for the simple reason that there will be disclosure of confidential information which if leaked, may tantamount to a contravention of the insider trading laws or in contravention of the relevant disclosure requirements under the Listing Requirements. The Target may not allow due diligence if within its reasonable view information disclosed contains price-sensitive information. In this regard, the alternative would be for the potential acquirer to rely on information extracted from publicly available sources such as conducting a public search through the CCM or Director of Insolvency Department.

(4) Definitive Agreement

Upon completion or during the course of the due diligence (as the case may be), parties may proceed to negotiate and agree on a definitive agreement usually known as, "sale and purchase agreement", "share purchase agreement" or "asset purchase agreement", depending on the type of transaction being undertaken. The key terms to a definitive agreement would include provisions on conditions precedent, representations and warranties, indemnities, undertakings or covenants and termination rights.

(5) Offer Document and Independent Advice Circular

Under the Code Rules, an offer document is required for Code Takeovers. It is to be submitted to the SC for its further comments and once the SC issues its clearance, it will be dispatched to the Target's board or directors and shareholders for deliberation. As the potential acquirer or offeror, it shall disclose all information that the shareholders would reasonably require and expect to find in an offer document or for the purpose of making an informed assessment as to the merits of accepting or rejecting the take-over offer and the extent of the risks involved in doing so.

In the case of the Target or the offeree, the board of directors is required under the Code Rules to appoint an independent adviser to provide comments, opinions, information and recommendation on the Code Takeover to the offeree's shareholders for their deliberation. Such comments and opinions are usually in the form of an independent advice circular, which must not be dispatched to shareholders of the Target until the SC has notified that it has no further comments.

All directors of the bidder are responsible for the accuracy of the information disclosed in the announcements or offer document. To this end, the board of directors of the bidder is required to issue a directors' responsibility statement stating that all directors will jointly and severally accept full responsibility for the accuracy of the information relating to an offer or potential offer. Where a director has a conflict of interest, he/she may amend the responsibility statement required to make it clear that he/she does not accept responsibility for the views of the board on the offer.

(6) Documents required under the Listing Requirements

Provisions under the Listing Requirements will have to be adhered to in relation to the Code Takeover. Whether the listed company is the party acquiring or to be acquired, announcement(s) will have to be made and if the transaction exceeds the percentage ratios (which calculation basis are provided under the Listing Requirements), shareholders' approval will be required. A circular will have to be prepared to seek its shareholders' approval for the transaction at the annual general meeting or an extraordinary general meeting (as the case may be) to be held. Such documents are usually prepared by the listed company with the assistance of its financial and legal advisers.

Generally, parties may opt to enter into any other documents they deem fit to better manage the transaction. There may be other elements to the transaction which requires separate agreements to be prepared.

CHAPTER 8 REGULATORY CHARGES AND FEES

For Code Takeovers, certain charges or fees may apply or be imposed by the relevant regulatory bodies and such fees may include perusal or processing fees payable to Bursa and/or SC.

(1) Fees payable to the SC

The SC is the principal regulatory authority overseeing Code Takeovers. The Capital Markets and Services (Fees) Regulations 2012 ("**Regulation**") sets out the fees payable to the SC in respect of such Code Takeovers. The relevant items in Schedules 1 and 2 of the Regulation are extracted below:

Proposal	Fees	
Acquisition or restructuring scheme resulting in significant change in business direction (including where it results in the transfer of listing of corporation listed on alternative market to Main Market of Bursa)	RM80,000.00 + 0.05% of the total market value of equity or convertible securities to be issued. Where market value is not available, the nominal value, subject to maximum of RM800,000.00 (inclusive of fees for review of asset valuation, if any)	
Clearance of offer document	Offer value from RM 1.00 to RM2.98 billion	RM10,000.00 + 0.05% of offer value (up to RM2.98 billion); and
	Any remaining sum above offer value of RM2.98 billion	0.025% of the remaining offer value
Clearance of independent advice circular	RM5,000.00	
Exemption from mandatory take-over offer obligation	RM15,000.00	
Exemption from provisions of the Code other than an exemption from mandatory take-over offer obligation	RM7,000.00	
Ruling	RM7,000.00	
Procedure for compulsory acquisition	RM2,000.00	
Extension of time	RM2,000.00	

(2) Fees payable to Bursa

Bursa governs, amongst others, listing of issuers and products on the local stock exchange and imposes fees for the listing and quotation of shares, perusal fees, processing fees etc. The fees imposed are set out below:

Perusal Fees	For the perusal of documents, e.g. circulars, notices and reporting thereon, the Exchange will charge fees as determined from time to time.
Processing fee for application for subdivision / consolidation of shares	A fixed fee of RM10,000
Processing fee for application for waiver, modification of or extension of time to comply with the provisions of the Listing Requirements	A fixed fee of RM2,000
Processing fee for application for new issuance of securities	(a) Bonus issue – RM5,000 + 0.005% of the issued and paid up capital to be listed subject to a maximum amount of RM300,000 (b) Share issuance scheme – a fixed fee of RM3,000 (c) All other offering of securities (rights issue, private placements etc.) – RM10,000 + 0.01% of the nominal value of the new securities issued subject to a maximum amount of RM300,000.

CHAPTER 9 SHAREHOLDERS' APPROVAL IN CODE TAKEOVERS

Generally, directors are empowered to make decisions relating to the business of a company, including approving Code Takeovers. This is however subject to certain transactions requiring shareholders' approval to be obtained under the Companies Act and the memorandum and articles of association of the company.

Section 132C of the Companies Act requires shareholders' approval to be obtained for transactions which involve the (a) acquisition of an undertaking or property of a substantial value; or (b) disposal of a substantial portion of the company's undertaking or property. Transactions entered into in contravention of Section 132C shall be void, except in favour of a person dealing with the company in good faith for valuable consideration. This provision is correspondingly found under Section 223 of the New CA and there will be an increased penalty to a fine not exceeding RM3 million under the new provision.

In respect of an unlisted company, "substantial value" or "substantial portion" is determined according to the highest of the following: (a) its value exceeds 25% of the total assets of the company, (b) the net profits attributed to it amounts to more than 25% of the total net profit of the company, or (c) its value exceeds 25% of the issued share capital of the company.

For deals involving a subscription of shares in a company (as opposed to a share purchase), shareholders' approval are also required pursuant to Section 132D of the Companies Act. Any issue of shares in contravention of this section shall be void. A similar provision is now found under Section 75 of the New CA.

Section 132E of the Companies Act prohibits any transaction involving shares or non-cash assets of a requisite value between a company and its director or substantial shareholder or persons connected to its director or substantial shareholder unless the prior approval of the shareholders is obtained. This requirement does not however apply to transactions entered into between a company and its wholly-owned subsidiary, its 100% holding company, or another wholly-owned subsidiary of its 100% holding company. This provision is correspondingly found under Section 228 of the New CA.

"Persons connected" includes a family member, an associated company, a trustee of a trust to which the director or substantial shareholder is a beneficiary or a partner of such director or substantial shareholder or persons connected to him. In respect of unlisted companies, a non-cash asset of the "requisite value" refers to a non-cash asset with (a) a value exceeding RM250,000; or (b) a value of at least RM10,000 and less than RM250,000, but exceeds 10% of the company's asset value.

The Listing Requirements contains more stringent requirements. A listed company intending to enter into a major transaction, being a transaction with a percentage ratio of 25% or more, requires the prior approval of the shareholders in a general meeting.

The percentage ratio is calculated in accordance with certain bases set out in Chapter 10 of the Listing Requirements ("**Percentage Ratio**"). This includes: (a) the value of the assets which are the subject matter of the transaction compared with the net assets of the listed company; (b) the net profits of the assets which are the subject matter of the transaction compared with the net profits attributable to the owners of the listed company; (c) the aggregate value of the consideration relating to the transaction compared with the net assets of the listed company; and (d) the total assets of the transaction compared to the total assets of the listed company.

If the transaction to be entered by a listed company involves a related party and has a Percentage Ratio of 5% or more, then the prior approval of its shareholders is also required. A related party includes a director, major shareholder or persons connected with such director or major shareholder.

CHAPTER 10 DUTIES OF DIRECTORS AND CONTROLLING SHAREHOLDERS TO STAKEHOLDERS

(1) Directors

The fiduciary duties of directors set out under the Companies Act and common law principles require directors to act in the best interest of the company as a whole. These are generally set out as follows:

(a) To act bona fide and in the interest of the company as a whole;

(b) Use powers for their proper purposes;

(c) Avoid conflict of interest; and

(d) Exercise care, diligence and skill.

Section 132 of the Companies Act sets out specific statutory duties and liabilities of directors. Section 132(1A) requires a director to exercise reasonable care, skill and diligence, with not only the knowledge, skill and experience which such director in fact has, but also with the knowledge, skill and experience, which a director, having the same responsibilities, is expected to have.

A director who makes a business judgment is deemed to have met the preceding care, skill, and diligence, provided that such director:

(a) makes the business judgment in good faith for a proper purpose;

(b) does not have a material personal interest in the subject matter of the business judgment;

(c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) reasonably believes that the business judgment is in the best interest of the company.

Directors may rely on information, professional or expert advice, opinions, reports or statements on a particular deal made by:

(a) any officer of the company believed on reasonable grounds to be reliable and competent in the matters concerned;

(b) any other person retained by the company as to matters involving skills or expertise in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;

(c) another director in relation to matters within the director's authority; or

(d) any committee to the board of directors within the committee's authority.

Corresponding provisions are found under Subdivision 3, Division 2 of Part III of the New CA.

However, pursuant to Section 132(1D) of the Companies Act, a director's reliance is only deemed to be on reasonable grounds if such director independently assessed such information before placing any reliance on the information when making any decision. This provision is correspondingly found in Section 215(2) of the New CA.

In instances where directors have delegated any powers of the board of directors to any delegatee, Section 132(1F) of the Companies Act requires such directors to be responsible for the exercise of such power, as if such power delegated had been exercised by the delegating directors themselves.

Depending on the type of dispute or issue, directors generally must place higher priority on the interest of persons truly affected. For instance, in a case of a de-listing of the company, the Court of Appeal held that since the shareholders were the most affected and not so much the company, the directors must act in the best interest of the shareholders (*Pioneer Haven Sdn Bhd v Ho Hup Constructions Co Bhd & Anor and other appeals* [2012] 3 MLJ 616).

It is worth noting that the Companies Act imposes criminal liability on directors for breach of fiduciary duties where directors are liable to imprisonment of up to five years or a fine of thirty thousand ringgit (penalty has been increased to three million ringgit under the New CA). A director who is found to be in breach of his duties may also be held liable for the losses arising from the abuse of his position and the company may resort to various remedies to recover from such director any loss suffered unless the courts are of the view that such director had acted honestly and reasonably. Under common law, in the event of any irregular action exercised by a director, the majority shareholder may in a general meeting of the company, decide to ratify such irregular action. However, the new regime retains the provision that such ratification does not prevent any person from bringing, intervening in or defending proceedings with the leave of the Court in Section 349 of the New CA.

(2) Controlling Shareholders

Controlling shareholders must not oppress or unfairly discriminate against minority shareholders of a company. Under Section 181 of the Companies Act (Section 346 under the New CA), the courts have the power to make an order to, amongst others, prohibit any oppressive or discriminatory act, or even regulate the conduct of the affairs of the company in the future. Hence, if controlling shareholders pass resolutions which are oppressive against minority shareholders, or disregard minorities' interests, Section 181 of the Companies Act can be invoked (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 22). The Federal Court held that damages can be awarded in cases where minority oppression has been established (*Koh Jui Hiong @ Ko Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another* appeal [2014] 3 MLJ 10).

For public listed companies, the Code contains principles and rules governing the conduct of all persons or parties involved in a take-over offer, merger or compulsory acquisition, including an acquirer, offeror, offeree and their officers and associates. The basic policy underlying the Code sets out general principles which are to be observed and complied with by all persons engaged in any take-over or merger transaction. Some of the general principles central to this Chapter are:

(a) the fair and equal treatment to all shareholders of an offeree of the same class, and equal opportunities of participation in benefits accruing from take-over offers, including in the premium payable for control;

(b) all shareholders, in particular, minority shareholders, shall not be subject to oppression or disadvantage by the treatment and conduct of the acquirer or offeror, as the case may be, or of the board of directors of the offeree; and

(c) board of directors of an offeree shall act in the interests of the shareholders as a whole and shall not deny the shareholders the opportunity to decide on the take-over offer.

CHAPTER 11 BREAK-UP FEES PAYABLE BY THE TARGET COMPANY

Break-up fee is a fee that requires a party (the "**Exiting Party**") to pay the other if the Exiting Party backs out of a deal.

The break-up fee paid by the Exiting Party is meant to compensate the other for the cost of the time and resources expended in negotiating the original agreement and also for the loss of opportunity.

There is no specific provision on break-up fees under the Code and Code Rules. However, under Section 67 of the Companies Act, a company is prohibited from giving, whether directly or indirectly any financial assistance for the purpose of or in connection with a purchase or subscription of its own shares. Hence, a Target is prohibited under Section 67 of the Companies Act to pay a break-up fee in any circumstances. This provision is correspondingly found in the New CA under Section 123.

Payment of break-up fees is however not a common practice in Malaysia and especially not in a Code Takeovers. In a private deal, a potential purchaser will usually pay a deposit prior to entering into the transaction and in the event it backs out from the deal, the said deposit would then be forfeited.

CHAPTER 12 FINANCING FOR CODE TAKEOVERS

(1) General

Pursuant to the Code and the Code Rules, in take-over offers involving cash or an element of cash, the offeror shall confirm, and its financial adviser must be reasonably satisfied, that the takeover offer will not fail due to insufficient financial capability of the offeror and that every target shareholder who wishes to accept the offer will be paid in full. The SC may require evidence to support the statement issued by the bidder or its financial advisers that resources are available to satisfy the bidder's obligations in respect of the offer.

Schedule 1 of the Code Rules states that the offer document shall include, among others:

(a) the offer price and its basis for the securities of the offeree and, in the event of a securities exchange offer, the basis of the consideration for the securities exchange offer;

(b) where a take-over offer is for the securities in a downstream entity, the basis of valuation of the offer price of the downstream entity;

(c) where the offer consists of or includes cash, a confirmation by the bidder and the bidder's financial advisers that resources available to the bidder are sufficient to satisfy full acceptance of the offer.

(2) Types of Financing

The traditional methods of financing would include using internally generated funds or raising money from equity markets through secondary fundraising exercises. Examples of such financing are set out below:

(a) Debt Financing

(i) M&A Senior Lenders

A senior lender is usually a bank that lends a company money (a senior loan), often for the express purpose of financing an acquisition. As the name implies, this lender is senior to all other lenders, which means that the senior lender gets paid before the other lenders in the event the borrower goes bankrupt.

(ii) Lines of Credit

A line of credit ("**LOC**") is simply a loan from a bank, often used to help finance acquisitions. Unlike a senior loan, the borrower pays interest on the amount it has used. A company may have a RM5 million LOC, but only RM2 million was used to help pay for an acquisition, the company only pays interest on the RM2 million, not the full RM5 million available.

(b) Equity Financing

Equity financing involves the offer and sale of the buyer's securities for the purpose of raising the capital to pay the seller and to provide working capital for the new company. Typically the buyer seeks equity from sources such as private equity firms, venture capitalists, and angel investors. This is different than a loan in that the buyer does not need to focus on repaying the debt but the buyer has to be prepared to give up partial ownership and in some cases, control.

(c) Mezzanine Financing

Mezzanine Financing is a hybrid of debt and equity financing. Financing programs or acquisitions by this mechanism typically involve some combination of lending by the source of money and provision of equity by the borrower.

As stated above, Section 67 of the Companies Act prohibits the giving of financial assistance by a company in relation to the purchase of its own shares subject to certain limited exceptions. The penalty for contravention of this section may result in imprisonment of 5 years or a fine of RM100,000 or both. This prohibition does not apply to acquisition of assets. It is to be noted that the prohibition in Section 67 of the Companies Act is also found under Section 123 of the New CA but with a heftier penalty of imprisonment of up to 5 years or a fine of up to RM3 million or to both.

CHAPTER 13 TRANSACTION TIMELINES

Generally, there is no prescribed timeline in law within which a business transaction must be completed. In cases where approvals (such as those from the regulators) are required, the time frame required to secure such approvals depends primarily on the policy and practices adopted by the respective governmental department/organisation.

Whilst the Code does not specify a timeline in which a business transaction should be completed, the Code Rules specifies the timeline for Code Takeovers once a firm intention to make an offer is announced until the offer is closed or lapses. The timeline for Code Takeovers is as follows:

Day(s)	Event
T	An offeror who makes a take-over offer or proposes a possible take-over is required to make a public announcement of the take-over offer or the possible take-over offer by way of a press notice. The offeror must also send a written notice of the same subject matter ("**Written Notice**") to the Target's board of directors, the SC, and Bursa if the securities of the Target are listed. Note that the announcement should be made only when an offeror has every reason to believe that it can and will continue to implement the take-over offer. The Target's board of directors shall, within 1 hours of the receipt of the Written Notice, make an announcement (that they have received the Written Notice) ("**Announcement**") to: (a) the public by way of a press notice (for non-listed Target); or (b) Bursa (for listed Target).
T + 4	The offeror is required to submit the draft offer document to the SC for its further comments.
T + 7	The Target's board of directors is required to dispatch the Announcement to all its shareholders.
T + 21 ("**D**" or "**Dispatch Date**")	The offeror is required to dispatch to the Target's board of directors and shareholders the offer document upon clearance by the SC, within 21 days from the date of the sending of the Written Notice.
D + 10	The Target's board of directors is required to issue a circular with comments, opinions and information (including any other forms of consideration offered by the offeror) on the take-over offer to its shareholders. The independent adviser appointed by the Target's board of directors is required to issue an independent advice circular with its comments, opinions, information and recommendation on the take-over offer to the Target's board of directors, shareholders and holders of convertible securities.
D + 21	The offeror is required to keep the take-over offer open for acceptance for a period of at least 21 days from the Dispatch Date ("**Acceptance Period**"). The take-over offer may be accepted by the Target at any day after the Dispatch Date, but in any case shall not be more than 95 days from the Dispatch Date. However, if the offeror revises its offer, the offeror shall: (a) announce such revision in public by way of a press notice (for listed Target), or in writing to Bursa (for non-listed Target); (b) post the written notification of the revised take-over offer to all shareholders of

Day(s)	Event
	the Target; and (c) keep the offer open for an additional 14 days from the date of the posting of the written notification of the revised offer to the Target's shareholders.
D + 39	The board of directors of the Target should not announce material information relating to trading results, profit or dividend forecasts, and asset valuations after the 39th day following the dispatch of the offer document. Any announcement of such materials after the 39th day shall only be made after clearance by the SC.
D + 42	An accepting shareholder shall be entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the offer, if the offer has not by such date become unconditional as to acceptances. The entitlement to withdraw shall be exercisable until such time as the offer becomes or is declared unconditional as to acceptances.
D + 46	An offeror shall not revise a take-over offer or cause a take-over offer to be revised after the 46th day from the Dispatch Date. Where a competing take-over offer has been announced, the offeror shall not revise the take-over offer after the 46th day from the date on which the offer document relating to the competing take-over offer was dispatched to the shareholders of the Target.
D + 60 (the "**First Closing Date**")	The take-over offer shall lapse on the Dispatch Date + 60 if, by 5.00p.m. on that day, the offeror fails to receive acceptances which would: (a) in the case of a mandatory offer, result in the offeror and all persons acting in concert with the offeror holding in aggregate, more than 50% of the voting shares or voting rights of the Target; or (b) in the case of a voluntary offer, result in the offeror holding in aggregate, more than 50% of the voting shares or voting rights of the Target. Where a take-over offer has become or been declared unconditional as to acceptance as at the Dispatch Date, the closing date of the take-over offer shall not be later than 60th day from the Dispatch Date. Where a take-over offer has become or is declared unconditional as to acceptance on or before Dispatch Date + 46, the offeror shall keep the take-over offer open for at least 14 days from the date on which the take-over offer becomes or is declared unconditional, which in any event shall not be later than Dispatch Date + 60.
D + 81	All conditions attached to a voluntary offer, other than the acceptance condition which would result in the offeror holding in aggregate more than 50% of the voting shares or voting rights of the offeree, must be fulfilled within 21 days after the First Closing Date of the takeover offer.
D + 95	Where a take-over offer has become or is declared unconditional as to acceptance on or before Dispatch Date + 46, the offeror shall keep the take-over offer open for at least 14 days from the date on which the take-over offer becomes or is declared unconditional, which in any event shall not be later than Dispatch Date + 95.

CHAPTER 14 INDUSTRY-SPECIFIC RULES APPLICABLE TO A TARGET COMPANY

In Malaysia, there are various industry specific rules that could be applicable to a Target, whether public or private. The types of rules applicable would depend on the industry the company is in and the existing government policy for that industry. Examples of industry-specific rules include equity restrictions where only a certain percentage of foreign ownership is allowed, regulatory approval for any change of ownership, and minimum paid-up capital requirements in the event of foreign ownership etc. The government has, in recent years, undertaken liberalisation measures and now allows 100% foreign equity participation in a number of sectors, with no equity conditions imposed. These sectors include health and social services (such as veterinary services and child day-care services), rental/leasing services without operators (such as bareboat charters and rental/leasing services of ships excluding cabotage and offshore trades), tourism services (theme parks, convention/exhibition centres with seating capacity of above 5,000, and 4 and 5 star hotels), and certain computer and related services (consultancy services relating to the installation of computer hardware, software implementation services, and data processing services).

Some industry specific rules are set out below:

(1) Distributive Trade Services

The distributive trade services/retail sector (e.g. hypermarkets and department stores) remains a highly regulated sector, with its regulator being the MDTCC and the relevant policy document being the Guidelines on Foreign Participation in the Distributive Trade Services in Malaysia issued by the MDTCC. Proposals for foreign involvement in this sector (including acquisition of interest, and mergers and/or takeover of distributive trade businesses by foreign participation) are subject to the approval of MDTCC. All distributive trade companies with foreign equity are required to, amongst others, appoint Bumiputera director/directors, hire personnel at all levels including management to reflect the racial composition of the Malaysian population, formulate clear policies and plans to assist Bumiputera participation in the distributive trade sector, and utilise local companies for legal and other professional services which are available in Malaysia.

(2) Education and Industrial Training Services

Generally, foreign equity in education institutions and private higher education institutions is subject to the policy of Ministry of Education ("**MOE**") or the Ministry of Higher Education ("**MOHE**"), and any free trade agreements relating to services which Malaysia is a party. For example, the General Agreement on Trade in Services ("**GATS**") allows up to 49% foreign participation for educational services other than higher educational institutions; whereby the ASEAN Framework Agreement on Services ("**AFAS**") allows up to 51% foreign participation for educational services. Under the liberalisation initiative in 2012, foreign equity up to 100% will be considered by the relevant ministries for international schools, technical and vocational schools and private universities.

(3) Manufacturing

The Industrial Co-Ordination Act 1975 requires manufacturing companies (whether Malaysian or foreign owned, with shareholders' funds of RM2.5 million and above or engaging 75 or more full-time paid employees) to be licensed by the MITI. Although equity and export conditions imposed on manufacturing companies prior to 17 June 2003 will be maintained, foreign equity participation of up to 100% is allowed for most new investments and the expansion or diversification of projects.

CHAPTER 15 RECENT PROPOSALS AND REGULATORY CHANGES

In addition to the recent changes to the Code and the Code Rules, other recent changes to laws relevant to Code Takeovers are the Capital Market and Services (Amendment) Act 2015 ("**CMSA Amendment**") and the new Companies Act 2016.

The CMSA Amendment which came into effect on 15 September 2015 introduces various amendments to the CMSA that will have an impact on Code Takeovers. The CMSA Amendment provides enhanced protection to the offeree shareholders as the SC is empowered to appoint an independent adviser if the offeree company fails to do as required under the Code. The compulsory acquisition provisions under the CMSA has also been extended to cover convertible securities and thus, providing greater certainty for an offeror participating in a take-over offer.

The Companies Act 2016 which received its royal assent on 31 August 2016 and gazetted on 15 September 2016 is expected to come into force in stages starting from 1 January 2017. The Companies Act 2016 will replace the entire legal landscape currently provided for under the Companies Act. The reforms under the Companies Act 2016 include amongst others, migration to no-par value regime and changes to the dividend regime. The Companies Act 2016 overhauls the existing legal framework and is expected to have a significant bearing on Code Takeovers.

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Chapter 1
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Chapter 2
Key Government Regulators and Agencies *by Chelsea Chan and Yong Shih Han*

Chapter 3
Types of Code Takeovers *by Hew Li-Sha and Gillian Chew*

Chapter 4
Hostile Bids under the Code *by Calvin Lau and Chor Jack*

Chapter 5
Squeeze out of Minority Shareholders *by Hew Li-Sha and Chor Jack*

Chapter 6
Restrictions or Others Laws on Code Takeovers *by Loy Ee Lin and Kimberly Goh*

Chapter 7
Documentation for Code Takeovers *by Ooi Ju-Lien and Gillian Chew*

Chapter 8
Regulatory Charges and Fees *by Tan Yi Li and Ooi Ju-Lien*

Chapter 9
Shareholders' Approval in Code Takeovers *by Philipp Lum and Kimberly Goh*

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Duties of Directors and Controlling Shareholders to Stakeholders *by Philipp Lum and Choo Yuen Phing*

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Chapter 13
Transaction Timelines *by Nick Yap and Jorin Tan*

Chapter 14
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Chapter 15
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